Leo Fasterners Sdn Bhd v Wilayah Leasing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–849 OF 2000
GOPAL SRI RAM, MOHD GHAZALI AND AZMEL MAAMOR JJCA
5 DECEMBER 2005

Civil Procedure — Appeal — Interference by appellate court — No misdirection on facts or misreading of documents by trial judge — Whether appellate interference warranted

The appellant executed seven hire purchase agreements in the respondent's favour. All of them related to machinery. In the High Court, the appellant contended that the whole transaction was a sham or device to cloak an illegal moneylending contract. The issue was whether it was the appellant or the respondent who was the legal and beneficial owner of the machinery. The High Court found for the respondent. The appellant appealed saying that the High Court erred and that it ought to have held the appellant to be the legal and beneficial owner of the machinery in question.

Held, dismissing the appeal:

(1) In his judgment the learned judge undertook a careful examination of the affidavit and documentary evidence presented to him. He found as a fact that the appellant did not make any payments towards the purchase price of the machinery. As against the primary, first hand evidence produced by the respondent, the appellant sought to make out its case based on conjecture and suspicion. However, conjecture and suspicion is no substitute for proof (see para 3); *Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd* [2001] 4 MLJ 321 referred.

(2) In the instant case, there was no credible denial of the respondent's version. The High Court judge was perfectly entitled to act on it. There was also no misdirection on the facts and no misreading of the documents. It would therefore be wrong of the Court of Appeal to interfere with the findings of the High Court judge (see para 5).

(3) It is one thing to allege that a transaction is a sham. It is quite another to bring home that allegation to the satisfaction of the court. Here, the appellant had to establish that the hire purchase agreements — all seven of them — were part of a moneylending transaction that it is to say, that they told a lie about themselves. However, the High Court judge looked at all the evidence and came to the conclusion that this was a case of a genuine hire purchase transaction. There was no appealable error in his judgment (see paras 6 and 7); *Polsky v S and A Services* [1951] 1 All ER 185 (referred).

[Bahasa Malaysia summary

Perayu telah menandatangani tujuh perjanjian sewa beli berpihak kepada responden. Kesemua perjanjian adalah berkaitan dengan mesin-mesin. Di Mahkamah Tinggi,

perayu telah menyatakan bahawa keseluruhan transaksi adalah palsu ataupun hanya merupakan satu alat untuk melindungi satu kontrak pinjaman wang secara haram. Isunya adalah sama ada perayu atau responden yang merupakan pemilik sah dan benefisial mesin-mesin itu. Mahkamah Tinggi membuat keputusan yang berpihak kepada responden. Perayu merayu dan menyatakan bahawa Mahkamah Tinggi telah salah dan sepatutnya membuat keputusan bahawa perayu adalah pemilik sah dan benefisial mesin tersebut.

Diputuskan, menolak rayuan:

(1) Dalam penghakimannya, yang arif hakim telah menjalankan pemeriksaan yang teliti ke atas afidavit dan keterangan dokumentari yang dikemukakan di hadapan beliau. Beliau mendapati bahawa secara faktanya, perayu tidak membuat sebarang pembayaran bagi harga pembelian mesin tersebut. Bertentangan dengan keterangan utama yang sempurna yang dikemukakan oleh responden, perayu telah mewujudkan kesnya berdasarkan tekaan dan rasa syak. Walau bagaimana pun, tekaan dan rasa syak bukanlah ganti bukti (lihat perenggan 3): *Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd* [2001] 4 MLJ 321 dirujuk.

(2) Dalam kes ini, tidak terdapat sangkalan yang boleh dipercayai terhadap versi responden. Hakim Mahkamah Tinggi tersebut sememangnya berhak berbuat begitu berdasarkannya. Juga tiada sebarang salah arah atau salah bacaan terhadap dokumen-dokumen. Oleh itu, adalah salah bagi hakim Mahkamah Rayuan untuk campur tangan dalam penemuan hakim Mahkamah Tinggi (lihat perenggan 5).

(3) Adalah satu perkara untuk mendakwa bahawa sesuatu transaksi itu adalah palsu. Adalah satu perkara berbeza untuk membuktikan dakwaan tersebut sehingga memuaskan mahkamah. Di sini, perayu perlu membuktikan bahawa perjanjian jual beli — kesemua yang tujuh tersebut — adalah sebahagian daripada transaksi pinjaman wang iaitu, bahawa mereka telah berbohong tentang diri mereka. Walau bagaimanapun, hakim Mahkamah Tinggi telah meneliti kesemua keterangan dan telah membuat kesimpulan bahawa ianya adalah satu transaksi sewa beli sebenar. Tiada kesalahan yang boleh dirayu dalam penghakimannya (lihat perenggan 6 dan 7); *Polsky v S and A Services* [1951] 1 All ER 185 (dirujuk).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue), paras 946–964.

Cases referred to

Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd [2001] 4 MLJ 321 (refd)
Tav Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)
Polskv v S and A Services [1951] 1 All ER 185 (refd)

Appeal from: Originating Summons No MT4–24–302 of 2000 (High Court, Shah Alam)

Prasad Abraham (Zakaria Ariffin with him) (Aziz Zakaria Shaiful & Wan) for the appellant.

L Sabapathy (CW Lee and S Bhuvaneswary with him) (Gooi & Azura) for the respondent.

Gopal Sri Ram JCA:

[1] This is a very simple case. It is purely factual. The appellant executed seven hire purchase agreements in the respondent's favour. All of them relate to machinery. The issue is whether it is the appellant or the respondent who is the legal and beneficial owner of the machinery. The High Court found for the respondent on that issue and granted a declaratory decree to that effect. The appellant says that the High Court erred and that it ought to have held the appellant to be the legal and beneficial owner of the machinery in question.

[2] All the documents show that it was the respondent who purchased the machinery from the vendor and let it under hire purchase agreements to the appellant. The appellant says that despite what appears on the face of the documents, the whole transaction is a sham or device to cloak an illegal moneylending contract. Now, I must mention one matter for completeness. The appellant is under receivership. Receivers and managers were appointed under a debenture. So, the real appellants are the receivers and managers.

[3] In his judgment the learned judge undertook a careful examination of the affidavit and documentary evidence presented to him. He accepted the evidence of Kwek Chui Puan, the former finance director of the appellant who has personal knowledge of the transaction and who was directly involved in negotiating the hire purchase agreements in question. He also found as a fact that the appellant did not make any payments towards the purchase price of the machinery. As against the primary, first hand evidence produced by the respondent, the appellant sought to make out its case based on conjecture and suspicion. But as has been said on numerous occasions, conjecture and suspicion is no substitute for proof. See *Mega Air Conditioning Sdn Bhd v Speedfam Co Ltd* [2001] 4 MLJ 321.

[4] No doubt, this is a case which the judge decided on affidavit evidence. Neither side asked to cross examine its opponent's witnesses. In a case such as this the approach to be adopted by the primary trier of fact is that set out in the Advice of Board of the Privy Council delivered by Lord Templeman in *Tav Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433:

> In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations.

[5] In the instant case, there was no credible denial of the respondent's version. The judge was therefore perfectly entitled to act on it. Having done so, it would, in my judgment, be wrong of us to interfere with his findings. Particularly so in this case where there has been no misdirection on the facts and no misreading of the documents.

[6] Before concluding let me say this. It is one thing to allege that a transaction is a sham. It is quite another to bring home that allegation to the satisfaction of the court. Here the appellant had to establish that the hire purchase agreements — all seven of them — were part of a moneylending transaction that it is to say, that they told a lie about themselves. As Lord Goddard said in *Polskv v S and A Services* [1951] 1 All ER 185:

> The Court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods. It is perfectly clear from the judgments of Lord Esher MR, in *Re Watson* (1890) 25 QBD 27, 63 LT 209 and in*Madell v Thomas & Co* (1891) 1 QB 230, 64 LT 9 that that is the question which has to be determined. The Court is not to look merely at the documents. It must discover what the real transaction was.

[7] This is precisely what the judge did. He looked at all the evidence and came to the conclusion that this was a case of a genuine hire purchase transaction. I can find no appealable error in his judgment.

[8] In the event, the appeal was dismissed without calling upon counsel for the respondent. The usual orders consequent upon a dismissal were made.

[9] My learned brothers Mohd Ghazali Yusoff and Azmel Maamor JJCA have seen this judgment in draft and have expressed their agreement with it.

Appellant's appeal dismissed.

Reported by John Paul Simon